BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NKESE MAY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,063,764
PRESBYTERIAN MANORS, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent requests review of the April 8, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Joseph Seiwert, of Wichita, Kansas, appeared for the claimant. Gary K. Jones, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations as did the ALJ and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held on April 4, 2013, with attached exhibits, and the documents of record filed in this matter with the Division.

ISSUES

The ALJ found claimant suffered personal injury by accident arising out of and in the course of her employment with respondent on November 18, 2012, and claimant provided timely notice of the injury. The ALJ went on to appoint Dr. Whittaker as claimant's treating physician and ordered temporary total disability to be paid should claimant receive restrictions that can't be accommodated or if claimant is taken off work. The ALJ issued no rulings on the issues associated with claimant's contentions that she suffered an additional injury or injuries on December 30, 2012.

Respondent appeals, arguing claimant did not suffer personal injury by accident or repetitive trauma on the dates alleged; that the alleged injury or injuries did not arise out

of and in the course of claimant's employment; that the alleged accident or repetitive trauma was not the prevailing factor causing claimant's medical condition and need for treatment and that claimant failed to provide proper and timely notice of any alleged accident or injury. Therefore, respondent contends the Order should be reversed.

Claimant argues the Order should be affirmed.

FINDINGS OF FACT

Claimant began working for respondent in May 2009. She left after three months and then returned to work as a CNA and CMA. Claimant's job duties required that she assist patients at respondent's facility.

Claimant testified that on November 18, 2012, she was assisting a patient named Pearl to a wheelchair after lunch when she felt a sharp pain in her back. Claimant took a short break and then continued with her shift. Claimant was working with Mercedes Miller on this day. Claimant testified that the pain in her back got worse when she sneezed while assisting another resident. She applied ice to her back and had someone else help Ms. Miller with the last resident, and told Ms. Miller that she was going to leave early and was going home. On her way home, claimant attempted, unsuccessfully, to get gas for her car, but could not get out of her vehicle. During her discovery deposition, claimant testified that she went to the ER on the day she stopped to get gas, when her back was bad.[1]

Claimant was off work on November 19, and on November 20 she contacted her family physician, James Hild, D. O., who directed her to the Via Christi Hospital emergency room. Claimant testified she reported to the emergency room staff that she hurt herself at work a few days earlier while she was working.[2] However, the ER records do not indicate claimant suffered a work-related accident or injury. Where the form inquires about the mechanism of injury, it is circled "no known recent injury".[3] Claimant received injections at the emergency room.

On November 21, claimant met with Dr. Hild, at Clifton Family Medicine. The history provided discusses claimant's appearance at the ER the night before. But, the history also indicates claimant denied any trauma to her back.[4] Dr. Hild prescribed medication and gave her a note with restrictions to not lift over 5 pounds for two weeks.

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[1] P.H. Trans., Resp. Ex. 13 at 30.

[2] P.H. Trans. at 37.

[3] P.H. Trans., Resp. Ex. 3 at. 6.

[4] P.H. Trans., Resp. Ex. 4 at 4.

Claimant took Dr. Hild's November 21, 2012, note into work and left it in the HR box.[5] Claimant then performed her work until she was called into the office. The meeting, on November 26, 2013, involved claimant, Bonnie Jo Rupke, former interim director of nursing, Crystal Apsley, RN staff development coordinator and Susan Brown, respondent's HR director. Claimant was asked what was going on and claimant testified she explained that she was having back pain and it occurred while claimant was lifting a resident in a wheelchair. She was told to clock out and leave and only return when the doctor released her. Claimant remained off work until she was released by Dr. Hild with no restrictions on December 10, 2012. Claimant returned to work with the understanding that she was to do as much as she could and report back to the doctor if she had any pain. Claimant was given light duty, but as she worked, her pain returned and she went back to the doctor. Claimant contends she reported her injury to respondent on November 18, 2012. Claimant was not given an accident report to complete at that time.

Claimant testified that she had discussed the possibility of having an MRI with Dr. Hild, but could not afford the expense. It was at that point claimant returned to Ms. Brown, and asked why her condition was not work-related. She was given an Employee Disability Claim Form on December 19, 2012 for short-term disability. On the form claimant wrote that her back problems were work-related. She described the incident when she was assisting the patient in the wheelchair.

Claimant returned to Dr. Hild at Clifton Family Medicine on December 27, 2012, complaining of low back pain which started "yesterday and she fell twice today. . . Her back pain was improving until she was lifting at work. This pain has been present for a total of 2 months now."[6]

An MRI performed on December 29, 2012, indicated severe back pain since a lifting injury on November 18, 2012. Disc bulges were noted at L1-2, L2-3, L4-5 and L5-S1, with mild stenosis at L2-3 and disc protrusion causing severe left stenosis at L4-5.[7]

Claimant alleges she suffered another accident on December 30, 2012, when she and a resident fell to the floor as claimant attempted to hold the resident up. Claimant testified that this fall caused the pain in her back to return and caused her to have pain in her neck and her knees.[8] The accident report filled out by claimant on that date indicated she had suffered no additional pain, above that which she was already experiencing.

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[5] P.H. Trans. at 14.

[6] P.H. Trans., Resp. Ex. 4 at 14.

[7] P.H. Trans. at 16.

[8] P.H. Trans. at 28.

However, as noted above, this claimed accident was not addressed by the ALJ in the Order.

Mercedes Miller, a CNA for respondent and claimant's co-worker, testified that she was working with claimant on November 18, 2012, transferring a resident named Pearl from a bed to a wheelchair. Ms. Miller testified that they used a lift to aid them in transferring the resident. She didn't notice anything wrong with the claimant at the time they were transferring Pearl. But, when they went on to the next resident, identified as Harold Duerson, claimant complained her back was hurting as they exited his room.[9] Claimant did not say how or why her back was hurting. Ms. Miller testified that claimant never complained about her back bothering her before November 18, 2012.

Bonnie Jo Rupke, former interim director of nursing for respondent[10], testified she was in a meeting with Ms. Brown, Ms. Apsley and claimant, in which claimant's limited duty restrictions were discussed. They talked about why claimant was put on light duty and what light duty entailed. Ms. Rupke testified that claimant did not report that she injured herself at work, but instead stated that she noticed the pain in her back after trying to get out of her car to fill her gas tank. There was no indication at the time of the meeting that claimant's pain was work-related. Ms. Rupke testified that claimant never came to her to complain of back pain.

Crystal Apsley was the RN staff development coordinator and restorative nurse for respondent. Part of her job was to complete the work schedule. Ms. Apsley testified that her records show claimant worked on November 18 and 19. No complaints or problems were reported on those dates. Claimant called in sick on November 20 and 23, November 21 and 22 were holidays and claimant was off on November 24 and 25. Claimant came to work on November 26 and brought in a doctor's note with a lifting restriction of five pounds. When asked if she had injured her back at work claimant said no.[11] Ms. Apsley echoed Ms. Rupke's testimony that claimant discussed going to the gas station and suffered pain as she attempted to get out of her vehicle.

Ms. Apsley testified that claimant was told she could not work on the floor with a five pound weight restriction, that she needed to go home and she could use vacation time until she healed, since respondent could not accommodate her. Claimant returned to work on December 11, 2012, with a note allowing claimant to return to work. Claimant indicated that she could continue to work on the medication cart, but not the floor, until her back completely healed.

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[9] P.H. Trans. at 58.

[10] Ms. Rupke's last day of employment with respondent was December 15, 2012.

[11] P.H. Trans. at 69.

Susan Brown, HR director for respondent, testified that she first became aware of claimant's back problem on November 26, 2012, when claimant brought in a doctor's note with a five pound lifting restriction. Ms. Brown asked claimant how her back pain started. Claimant didn't know, but was sure it was not work-related. Claimant did mention maybe twisting while trying to get out of her car to get gas. Ms. Brown testified that she was looking for claimant to show her something indicating her back pain was work-related. Since there was nothing connecting the pain to claimant's work duties, and since respondent was not able to accommodate claimant's restriction, claimant was sent home. Respondent's exhibit 10 to the preliminary hearing is a copy of the November 21, 2012, note from Dr. Hild limiting claimant to 5 pounds lifting. On the note Ms. Brown wrote the date of November 26, 2012, and listed the people present. The handwritten note on the restriction letter also notes claimant didn't know what happened to her back, when she was asked if her pain was work-related.

Claimant remained off work until she brought in a note dated December 10, 2012, returning her to work without restrictions. Claimant next came to Ms. Brown on December 19, 2012, requesting a workers compensation form, which respondent's corporate office instructed Ms. Brown to give to her. The form was filled out on December 19, 2012. Claimant alleged she suffered another accident on December 29, 2012, when she caught a falling patient. A new accident form was created and dated December 30, 2012, and claimant was offered medical treatment, which she refused. At the time of the preliminary hearing, claimant remained off work, but remained employed with respondent.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
>
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d)(e) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(B)(3)(A) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

. . .

(2)(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g) states:

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant contends she suffered personal injury by accident on November 18, 2012. However, her actions contemporaneous with that alleged accident do not support her claim. On November 20, 2012, at the Via Christi ER, she denied a recent injury. On November 21, 2012, claimant denied any trauma to Clifton Family Medicine. Claimant alleges Ms. Miller, a co-worker was a witness to the event involving Pearl. Yet, Ms. Miller denied any knowledge of an accident while lifting Pearl. She does acknowledge claimant's low back complaints later that day. But, that was with a different patient at a different time. Claimant met with several of respondent's representatives on November 26, 2012. Yet, again, she failed to identify any work-related accident. Instead, alluding to a problem as she was trying to get gas. This Board Member cannot find, based upon this record, that claimant suffered an injury by accident on November 18, 2012, which arose out of and in the course of her employment.

K.S.A. 2011 Supp. 44-520 states:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.
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> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Claimant failed to give notice of the alleged accident within the required statutory time frame. The first notice proven is on December 18, 2012, when claimant requested a workers compensation form from Ms. Brown. This is beyond the 20 days allowed by the statute for a current employee.

The Application For Hearing (K-WC E-1) filed with the Division on January 8, 2013, alleges not only an accident on November 18, 2012, but also a series thereafter and another accident on December 30, 2012. Neither the series of alleged accidents, nor the December 30, 2012 accident were addressed by the ALJ.

K.S.A. 2011 Supp. 44-534a(a)(2) states:

> Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given , or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

The Board is limited on an appeal from a preliminary hearing Order to determine specific identified issues. The Board does not have original jurisdiction to determine matters, but can only review that which the ALJ has already determined. Here, the ALJ has failed to address claimant's contentions that she suffered repetitive trauma or a separate accident on December 30, 2012. The Board has no power to correct that oversight, other than to remand the matter to the ALJ pursuant to K.S.A. 2011 Supp. 44-534a(i)(1), for a determination of the issues not yet addressed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that she suffered injury by accident on November 18, 2012, which arose out of and in the course of her employment, and further failed to prove she provided timely notice of that alleged accident. The Order of the ALJ is reversed on those issues. The matter is remanded to the ALJ for a determination of claimant's claimed traumatic injury through a series after November 18, 2012, and for a determination of claimant's allegations of an injury by accident on December 30, 2012, and any issues associated with those claims.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated April 8, 2013, is reversed and remanded, as above ordered.

IT IS SO ORDERED.

Dated this _____ day of June, 2013.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
jjseiwert@sbcglobal.net
nzager@sbcglobal.net

Gary K. Jones, Attorney for Self-Insured Respondent
gary@garyjoneslaw.com

Thomas Klein, Administrative Law Judge

[12] K.S.A. 2012 Supp. 44-534a.